IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 536
3122515

	BETWEEN	ANTJE PURGAND Applicant
	AND	DIRECTOR–GENERAL OF CONSERVATION Respondent

Member of Authority:	Peter van Keulen
Representatives:	Stephen Carruth, advocate for the Applicant Karen Radich, counsel for the Respondent
Investigation Meeting:	8 and 9 July 2021
Submissions Received:	9 July 2021 and 30 July 2021 with further information received up to 26 November 2021 from the Applicant 9 July 2021 and 20 August 2021 with further information received up to 26 November 2021 from the Respondent
Date of Determination:	1 December 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Antje Purgand was employed by the Director-General of Conservation (DOC) as a Hut Ranger for three seasons, with her last period of employment ending on 17 May 2019.

[2] In December 2019 Ms Purgand raised personal grievances in connection with her employment at DOC and these were settled in mediation on 17 March 2020.

[3] The terms of settlement between the parties were set out in a record of settlement (the Record of Settlement) and a mediator from the Mediation Services of the Ministry of

Business Innovation and Employment signed the Record of Settlement, pursuant to s 149 of the Employment Relations Act 2000 (the "Act").

[4] Clause 3 of the Record of Settlement provides:

> The parties agree they shall not make derogatory comments about each other to any other person or organisation.

[5] Ms Purgand claims DOC breached clause 3 of the Record of Settlement when her manager, Michel de Boulay, commented on Ms Purgand's description of her work duties as a Hut Ranger, in an email he sent to Wellnz Limited – a company that helps DOC as an ACC Accredited Employer manage work-related injuries.

[6] Based on this, Ms Purgand lodged a statement of problem in the Authority seeking compliance orders and a penalty against DOC for this alleged breach.

[7] DOC says the email from Mr de Boulay did not breach clause 3 of the Record of Settlement.

The Authority's investigation

[8] It is Ms Purgand's claim of breach of clause 3 of the Record of Settlement that I have investigated. I did this by receiving written evidence and documents, holding an investigation meeting on 8 and 9 July 2021 and assessing the oral and written submissions of the parties' representatives.

[9] I received affidavit evidence from John Dignan, Michael Stone and Kiyomi Sada and witness statements from Ms Purgand, Mr De Boulay and Geoffrey Owen. In my investigation meeting, under oath or affirmation, Ms Purgand, Mr de Boulay and Mr Owen confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[10] As permitted by 174E of the Act I have has not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

The events

[11] Ms Purgand was employed by DOC as a Hut Ranger at the Routeburn Flats hut on the Routeburn track for three Great Walk Seasons; 2016/2017, 2017/2018 and 2018/2019.

[12] In March 2018, Ms Purgand suffered an injury to her elbow whilst digging out a water table on the Routeburn track. This injury was covered by ACC and her treatment was paid for by DOC, as an accredited employer under the ACC Accredited Employer Programme.

[13] In June 2018 Ms Purgand reported a second injury whilst working. Ms Purgand lodged an ACC claim for this injury but after some analysis this was declined with Ms Purgand's case manager at Wellnz advising Ms Purgand to lodge a gradual onset injury claim instead. This third claim was lodged in April 2020.

[14] Ms Purgand's third ACC claim was declined after Ms Purgand had a consultation with an Occupational Medical Specialist. The specialist confirmed the physical injury giving rise to the claim, a bilateral epicondylitis of the elbow, but no work tasks were identified that caused the condition and the work Ms Purgand did was not identified as placing workers at significantly greater risk of developing bilateral epicondylitis.

[15] Ms Purgand was concerned about the consultation that led to this decision, primarily around whether the specialist had understood and appreciated her role and the tasks she did. Ms Purgand spoke to her case manager about these concerns on 8 June 2020.

[16] As a result of Ms Purgand's concerns, her case worker agreed that Ms Purgand could provide a more detailed description of her work tasks and the case worker would forward that on to the Occupational Medical Specialist to see if that might change the outcome.

[17] So, on 8 June 2020, Ms Purgand sent a 4 page email to her case worker outlining her work tasks as a Hut Ranger working at the Routeburn Flats hut.

[18] Ms Purgand's case worker then sent that email on to Mr de Boulay requesting him to provide any comments to her.

[19] Mr de Boulay responded with his comments later on 8 June 2020 in an email five paragraphs long. The email started with a reflection on Ms Purgand's detailed statement being a good synopsis of tasks that a Hut Ranger might be expected to carry out. The middle

three paragraphs added some context to Ms Purgand's synopsis explaining the location of the hut and the focus of the Hut Rangers at the Routeburn Flats hut, commenting on the maintenance work done by other DOC staff, suggesting Hut Rangers at Routeburn Falls do less track and hut maintenance and emphasising that the focus of Ms Purgand's work as a Hut Ranger at Routeburn Falls was public interaction and cleaning. Then, in the final paragraph Mr de Boulay made a comment that indicated he thought Ms Purgand had overstated the scope of her role.

[20] The Occupational Medical Specialist then reviewed the information provided but this did not alter her opinion.

[21] It was not until October 2020 that Ms Purgand became aware of Mr de Boulay's email and her advocate wrote to DOC advising that Mr de Boulay's comments were in breach of clause 3 of the Record of Settlement. The advocate summarised Ms Purgand's view of the breach as arising because Mr de Boulay had effectively advised the case worker and the specialist that Ms Purgand had not provided an accurate or honest description of her work and his final paragraph denigrated Ms Purgand by suggesting she possessed a poor character.

Analysis

[22] In *Byrne v The New Zealand Transport Agency*, Judge Corkill noted that the assessment as to breach of a non-disparagement clause involves consideration of the scope of the clause in the particular context and whether the particular facts amounted to a breach.[1] This is the approach I will take in this claim.

Scope of clause 3 of the Record of Settlement

[23] In *Byrne*, Judge Corkill assessed the scope of the clause in question by starting with the ordinary meaning of the words used in the clause and then cross-checking that meaning against the context.[2]

[24] Clause 3 of the Record of Settlement can be broken into the following parts for interpretation purposes:

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[1] *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187 at [102].
[2] *Byrne v The New Zealand Transport Agency*, above n 1 at [75] and [76], applying the contractual interpretation principles outlined in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147 and *New Zealand Airline Pilot's Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111.

(a) The parties;

(b) Shall not make derogatory comments;

(c) About each other;

(d) To any other person or organisation.

[25] The parties are Ms Purgand and DOC.

[26] DOC is a government agency charged with conserving New Zealand's natural and historic heritage. DOC is led by its Director-General and its business groups are managed by various Deputy Director-Generals, who form the leadership team. The day-to-day operation of DOC then occurs through delegated authority from the leadership team to management and from management to other employees. So DOC for any particular purpose is its leadership team and the employees who have delegated authority to act in respect of that particular purpose. Applying this to the Record of Settlement, DOC is the leadership team and any personnel authorised by that team to speak on behalf of DOC about Ms Purgand's employment.

[27] Derogatory means to lessen the reputation of a person or thing, to use denigrating or disparaging words or to make statements that are insulting of, or discredit, another.

[28] About each other clearly means any derogatory statement must relate to the other party, so Ms Purgand about DOC or DOC about Ms Purgand.

[29] To any other person or organisation means to anyone or any entity other than Ms Purgand or DOC.

[30] Putting all of this together the ordinary meaning of clause 3 of the Record of Settlement is that neither Ms Purgand nor DOC, which includes anyone authorised to comment on Ms Purgand's employment, can make a comment to a third party, which is denigrating or insulting of the other, discredits the other or lessens their reputation.

[31] The context of clause 3 of the Record of Settlement is that it arises out of an employment relationship and in particular that relationship coming to an end in circumstances

where an employment relationship problem has been raised. It follows that clause 3 only covers derogatory statements about Ms Purgand's employment.

[32] So, adding in the context the interpretation of clause 3 as it applies to DOC is that the DOC leadership team or anyone authorised to comment on Ms Purgand's employment shall not make any comment to a third party, about Ms Purgand that relates to her employment with DOC that is denigrating or insulting of her, discredits her or lessens her reputation.

Has DOC breached clause 3 of the Record of Settlement?

[33] The advocate for Ms Purgand says DOC has breached clause 3 of the Record of Settlement because Mr de Boulay's email is critical of Ms Purgand in several ways.

[34] Counsel for DOC submits that DOC has not breached clause 3 of the Record of Settlement by Mr de Boulay's email because:

(a) The email is not actually about Ms Purgand but rather her summary of tasks; the last paragraph simply notes Mr de Boulay's concern about Ms Purgand's narrative.

(b) The email is not derogatory because even if it can be interpreted as being critical of Ms Purgand there is no intentional denigration of her and overall the email is not negative about Ms Purgand.

(c) The email was not sent to another person or organisation as Wellnz is DOC's contractor for ACC Accredited Employer purposes, so the email is simply an internal email for the purposes of determining an ACC claim.

(d) The email falls outside the scope of clause 3 of the Record of Settlement because it does not relate to the circumstances in which Ms Purgand left her employment with DOC. In any event the email is one which DOC was obliged to send in terms of any disagreement it had with Ms Purgand's summary as that related to an ACC claim and then the response is a simple statement of fact.[3]

(e) Mr de Boulay did not have knowledge of clause 3 of the Record of Settlement.

[3] Analogous to the situation in *Evans-Walsh v Southern District Health Board* [2018] NZEmpC 46.

[35] Turning to my analysis of the respective arguments and my conclusions, the first point to note is Mr de Boulay's email is a statement made by DOC. Mr de Boulay was Ms Purgand's manager and was authorised to comment on Ms Purgand's work including the scope of her role and her abilities.

[36] Next, the email was sent to a third party. There are two parts to my conclusion on this aspect. I am not persuaded that Wellnz is effectively DOC and therefore not a third party; it is another organisation and this is so despite it being engaged as DOC's agent. But in any event Mr de Boulay's email was sent to the specialist who is a third party and Mr de Boulay knew it would be sent to that specialist, so he knew he was effectively making comments to the specialist.

[37] The more difficult analysis is whether Mr de Boulay's email is derogatory. My conclusion is that the last paragraph is derogatory of Ms Purgand. I accept that the last paragraph of Mr de Boulay's email is a statement about the accuracy of Ms Purgand's summary of her role and tasks. However, whilst the adjectives used by Mr de Boulay describe Ms Purgand's summary the type of words used and the way they are expressed in the whole sentence have the effect of impugning Ms Purgand's character. I am satisfied that on reading Mr de Boulay's last paragraph a person would think less of Ms Purgand and not simply apply the negative adjectives to her summary of her role and tasks.

[38] In addition I do not accept that to be derogatory of someone a comment needs to be an intentional denigration of that person. I have no doubt that Mr de Boulay did not intend to be derogatory of Ms Purgand and he genuinely believed the summary she provided had overstated the frequency and scope of some of her role and tasks in parts. And I readily accept that he and DOC generally had an obligation to respond to Wellnz truthfully and highlight any concerns about the inaccuracy of Ms Purgand's summary. This however does not mean he could comment as he did; Mr de Boulay could have commented on Ms Purgand's summary in terms that were not critical of Ms Purgand.

[39] I do not accept that the scope of clause 3 of the Record of Settlement means that Mr de Boulay's comments are not a breach; the clause is not limited to derogatory comments about Ms Purgand leaving employment with DOC, as submitted by counsel. I have already outlined that I find the scope is comments made relating to Ms Purgand's employment with DOC. To restrict the clause by a more narrow scope would render it almost moot, defeating the purpose

of the clause, which must be to protect each party from making derogatory comments about the other as that relates how they know each other or how they have formed the opinion.

[40] Finally, I accept that Mr de Boulay did not know about clause 3 of the Record of Settlement but I not accept that Mr de Boulay needed to know about clause 3 in order for his comments to be a breach of that clause.

Conclusion on breach of clause 3 of the Record of Settlement

[41] DOC has breached clause 3 of the Record of Settlement.

Remedies

[42] Ms Purgand seeks a compliance order and that a penalty be imposed against DOC for its breach of the Record of Settlement.

[43] Before I turn to consider each of these remedies I will make some observations that are relevant to those remedies.

[44] As part of my investigation into this claim I heard and considered a large amount of detailed evidence about the role of Hut Rangers both generally and specifically on the Routeburn track, particularly at the Routeburn Flats hut.

[45] Based on this I note:

(a) Ms Purgand genuinely believes her description of her role and the tasks she did as a Hut Ranger based at Routeburn Flats hut is accurate.

(b) Mr de Boulay also genuinely believes Ms Purgand's summary is inaccurate as that relates to the amount of time spent on track and hut maintenance and the extent of the work undertaken in completing track and hut maintenance, particularly compared to the work that the Hut Rangers at other huts on the Routeburn track or even other tracks, would do.

(c) I believe Ms Purgand's summary is accurate but I can see why Mr de Boulay has the concerns he does; the summary is presented in a way that a reader could believe the frequency and extent of the maintenance tasks is greater than it actually is. Ms Purgand did not intend that to be the case and expressed her

role as she did to ensure all of the tasks she did were set out and she made the point in her summary that she did not undertake all of the tasks or the extent of the maintenance work outlined every day.

(d) In responding as he did, Mr de Boulay wanted to (and needed to) put the frequency and extent of maintenance tasks described by Ms Purgand in perspective. He did this by pointing out that the Routeburn Flats hut was the least remote hut on the Routeburn track (or other tracks), was a better supplied and resourced hut and that the focus for Hut Rangers based there was on public interaction and cleaning, not maintenance. He also suggested that the summary was inaccurate, in terms that were derogatory of Ms Purgand. He could have expressed this in more neutral and non-critical terms, giving the reader an objective basis to assess the extent of the frequency and extent of maintenance tasks - for example, by adding some statistics, which I received as evidence, stating how much of a Hut Ranger's time at Routeburn Flats hut was spent on maintenance or cleaning or interaction with the public.

Compliance

[46] Ms Purgand's application for a compliance order is not just based on requiring DOC to comply with clause 3 of the Record of Settlement in future comments about Ms Purgand's employment with it; Ms Purgand seeks a compliance order requiring DOC to retract the disparaging statements in Mr de Boulay's email.

[47] I can make a compliance order in the terms requested, pursuant to s 137(2) of the Act. And despite having initial doubts about the appropriateness of such an order I am persuaded by the advocate for Ms Purgand that it is the correct approach.

[48] I order DOC to comply with clause 3 of the Record of Settlement by not making derogatory comments to any other person or organisation about Ms Purgand as that relates to her employment with it. And in order to comply with clause 3 DOC must also retract the first line of the last paragraph of Mr de Boulay's email to Wellnz dated 8 June 2020.

Penalty

[49] Whether a penalty should be imposed and if so the quantum of such penalty is informed by s 133A of the Act and relevant Employment Court decisions.[4]

[50] In this case the relevant circumstances giving rise to DOC's breach of clause 3 of the Record of Settlement are:

(a) Mr de Boulay believed he had to respond to Ms Purgand's summary in light of the ACC claim. He had a genuine belief that Ms Purgand's summary of her role and tasks was inaccurate and he needed to correct that on behalf of DOC. His attempt to do this was largely fine except for an ill judged statement about the overall accuracy of the summary. He had no intention of being critical of Ms Purgand and believed his statement was not critical of her rather it addressed her summary.

(b) Mr de Boulay's email has had an impact on Ms Purgand; she was angry and hurt by what was said and then devastated by the criticism in the final paragraph. However, there is no evidence to show that Mr de Boulay's email had any other impact as it appears it had no consequence to the outcome of the informal review. In any event Ms Purgand has a formal ACC review of her case to address Mr de Boulay's email pending. And the email was not circulated beyond the Wellnz case manager and the specialist.

(c) DOC was prepared to resolve the issue raised by Ms Purgand and it offered to provide Mr de Boulay's email with the relevant sentence retracted.

(d) The particular circumstances do not present a situation that needs to be marked with a penalty for deterrence purposes. It was an inadvertent breach which resulted from Mr de Boulay holding a different view of the effect of the particular sentence he wrote. This is not about a blatant breach nor is about a careless or negligent breach, for which a signal needs to be sent for deterrence purposes (either for DOC or other employers).

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[4] *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; and *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

(e) There was no evidence of previous failures by DOC to comply with any records of settlement.

[51] Overall when I balance these factors I conclude that this is about a mistake made by Mr de Boulay in expressing an opinion when he thought he was doing the right thing. And whilst that mistake had an impact on Ms Purgand, penalties are not about compensating an individual who might have suffered some impact, rather penalties are about imposing a sanction for bad behaviour. In this case Mr de Boulay's behaviour does not warrant a penalty being imposed.[5]

Orders

[52] DOC has breached clause 3 of the Record of Settlement.

[53] From the date of this determination, DOC must comply with clause 3 of the Record of Settlement, including by retracting the first line of the last paragraph of Mr de Boulay's email to Wellnz dated 8 June 2020.

Costs

[54] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[55] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority

[5] In coming to this conclusion *Evans-Walsh v Southern District Health Board*, above n 3, and *Byrne v The New Zealand Transport Agency*, above n 1, were both instructive.